No. 138, Original

In The

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion For Leave To Intervene

MOTION OF THE CATAWBA RIVER WATER SUPPLY PROJECT FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT OF THE MOTION

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TABLE OF CONTENTS

MOTION FOR LEAVE TO INTERVENE

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Defendant.

MOTION FOR LEAVE TO INTERVENE

The Catawba River Water Supply Project moves this Court for leave to intervene in the original action brought by South Carolina against North Carolina over equitable apportionment of the Catawba River, for the reasons stated in the accompanying brief in support.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

PROCEDURAL BACKGROUND 5

ARGUMENT 6

I. CRWSP HAS A DIRECT AND CONCRETE INTEREST IN THIS ORIGINAL ACTION. 6

II. CRWSP IS NOT ADEQUATELY REPRESENTED BY EITHER STATE. 8

III. PARTICIPATION BY CRWSP WILL AID THIS COURT'S DECISION. 10

IV. INTERVENTION WILL NOT PREJUDICE THE PARTIES. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Arizona v. California, 460 U.S. 605 (1983) 7
Biddix v. Henredon Furniture Industries, Inc., 331 S.E.2d 717 (N.C. Ct. App. 1985) 8
Colorado v. Kansas, 320 U.S. 383 (1943) 10
Colorado v. New Mexico, 459 U.S. 176 (1982) 11, 12
Colorado v. New Mexico, 467 U.S. 310 (1984) 12
Kansas v. Colorado, 206 U.S. 46 (1907) 12
Lowe v. Ottaray Mills, 77 S.E. 135 (S.C. 1913) 8
Maryland v. Louisiana, 451 U.S. 725 (1981) 6, 7
Nebraska v. Wyoming, 325 U.S. 589 (1945) .. 10, 11, 12
New Jersey v. New York, 345 U.S. 369 (1953) 9
Texas v. Louisiana, 416 U.S. 965 (1974) 6
Texas v. New Jersey, 379 U.S. 674 (1965) 7
United States v. Louisiana, 354 U.S. 515 (1957) 6
Utah v. United States, 394 U.S. 89 (1969) 10
White's Mill Colony Inc. v. Williams, 609 S.E.2d 811 (S.C. Ct. App. 2005) 8
Wyoming v. Colorado, 259 U.S. 419 (1922) 12

Rules

FED. R. CIV. P. 24 7
RULES OF THE SUPREME COURT OF THE UNITED STATES 17.2 7

STATEMENT OF FACTS

The Catawba River Water Supply Project ("CRWSP"), a joint venture of units of government of North *and* South Carolina, respectfully seeks leave to intervene in this original action brought by South Carolina against North Carolina over equitable apportionment of the Catawba River.

The two participants in CRWSP are Lancaster County Water and Sewer District ("LCWSD") and Union County ("UC"). LCWSD is a special purpose district organized under the laws of the State of South Carolina to furnish retail water and sewer services within Lancaster County, South Carolina. UC is a unit of local government, organized under the laws of the State of North Carolina, which supplies water and sewer services within its borders.

Although UC and LCWSD are units of government in different states, these two bodies face substantially similar short- and long-term challenges related to water supply. Each shares a border with Mecklenburg County, where the City of Charlotte is located. Mecklenburg County has one of the most rapidly expanding populations and economies in the State of North Carolina. Such growth has spread into UC and LCWSD, and, as a result, both are experiencing a swift and steady increase in population. In fact, UC is the fastest growing county in North Carolina, and the panhandle area of Lancaster County is one of the fastest growing areas in South Carolina. Both LCWSD and UC have engaged in extensive planning and committed considerable capital to address their customers' rapidly increasing demands for a reliable water source of high quality and sufficient quantity that can be economically treated

and then sold to consumers and wholesale purchasers at an affordable rate.

UC first noticed a significant increase in demand for water in the 1980s. Most of the demand was within the Catawba-Wateree Basin, which covers the western part of UC near the City of Charlotte. There was also a smaller increase in demand in the eastern part of UC, which encompasses the Yadkin-Pee Dee and Rocky River Basins. UC found that the Yadkin-Pee Dee River and the Rocky River could not meet these growing demands due to quantity and quality concerns with those sources. In addition, the absence of a dense population in eastern UC made it prohibitively expensive to install a distribution system and construct a water plant on the Yadkin-Pee Dee River and/or the Rocky River. UC determined that it could better serve the water demands of its citizens, including those in the eastern part of UC, through inter-basin transfer of water from the Catawba River. ("Inter-basin transfer" refers to the withdrawal of water from one source basin for consumption in another basin.)

LCWSD came to a similar conclusion. During the late 1980s, LCWSD used a reservoir on Bear Creek as its primary water source. However, problems with the water quality of Bear Creek led the South Carolina Department of Health and Environmental Control ("SC DHEC") to place LCWSD under a consent order to improve the water supply. Had LCWSD continued to rely on Bear Creek as its water source, the cost of correcting the quality problems would have exceeded $1.2 million without any corresponding increase in the quantity available from that source; as a result, customers would inevitably have

seen a rise in rates. LCWSD also anticipated dramatic growth in the panhandle area of Lancaster County, which could not be served from Bear Creek. Due to these problems, LCWSD found it necessary to find an alternative source of water: the Catawba River.

Because both UC and LCWSD intended to use the Catawba River to address their substantially similar problems with existing water sources, in the late 1980s they began negotiating a joint venture that together would provide them with a reliable, long-term water source of higher quality and sufficient quantity to satisfy present and future customer demand. In May 1991, UC and LCWSD created CRWSP. Under the joint venture, UC and LCWSD own a water plant, site piping, and other appurtenances as tenants in common; they also jointly own all other real and personal property of CRWSP. The plant, site piping, and other appurtenances were funded from revenue bonds issued by LCWSD and from general obligation bonds issued by UC. Such bonds have also funded subsequent expansions, which have been overseen and permitted by both States.

CRWSP has its own board, which includes representatives from both LCWSD and UC. Because UC and LCWSD treat CRWSP as a separate entity, CRWSP charges UC and LCWSD for water purchased from the plant. CRWSP has its own budget, revenues, expenses, income statement, balance sheet, assets, liabilities, and staff.

The CRWSP plant is located on the Catawba River in Lancaster County, South Carolina, but it is regulated by both States. For example, SC DHEC

granted permits to connect the plant both to LCWSD's existing water transmission lines and to UC's water transmission line at the boundary between North and South Carolina. On the other side of the border, the North Carolina Department of Environment and Natural Resources ("NC DENR") granted permits for UC's North Carolina infrastructure to complete the transfer of water from the CRWSP plant. CRWSP also complies with both the North and South Carolina Freedom of Information and procurement requirements.

CRWSP is permitted to produce 36 million gallons of water per day from the Catawba River. This withdrawal represents the second largest water intake from the Catawba River, behind only Charlotte-Mecklenburg Utilities.

Through CRWSP, both LCWSD and UC provide retail water services to their customers. CRWSP also allows LCWSD to supply wholesale water services to Mecklenburg County, North Carolina; Chesterfield and Kershaw Counties, South Carolina; the City of Lancaster, South Carolina; and the Towns of Kershaw and Heath Springs, South Carolina. In turn, UC supplies wholesale water services to the City of Monroe, North Carolina.

For the last 16 years, CRWSP has been a successful example of inter-governmental cooperation between governmental units from different states. Such inter-governmental cooperation has facilitated economic growth in the Charlotte region.

PROCEDURAL BACKGROUND

On June 7, 2007, the State of South Carolina filed with this Court a Complaint, Brief in Support of Motion for Leave to File a Complaint, and Application for Preliminary Injunction. These papers asserted that existing inter-basin transfers of water in North Carolina from the Catawba River are inequitable and that any such existing or future transfers of water should be enjoined. (S.C. Compl. ¶¶ 3-4.) South Carolina specifically identified UC as an example of an inequitable inter-basin transferor of Catawba River water. (*Id.* at ¶ 21.) Although South Carolina has acknowledged that UC is permitted to make inter-basin transfers under South Carolina regulations and North Carolina law (S.C. Application for Prelim. Inj. at 2 n.1), South Carolina's prayer for relief requested that North Carolina's inter-basin transfer statute not be used as authority for *any transfer* from the River – including, presumably, transfers by UC through CRWSP. (*Id.* at 10.)

In response to South Carolina's Application for a Preliminary Injunction and Motion for Leave to File a Bill of Complaint, North Carolina has invoked the decisions of its agencies and asserted the right of communities and businesses outside of the Catawba River Basin to withdraw water for consumption in North Carolina. (N.C. Resp. to Application for Prelim. Inj. at 8.) Although CRWSP has not yet seen North Carolina's answer to South Carolina's bill of complaint, it is already evident that North Carolina will invoke its right to withdraw water upstream of CRWSP's intake, which is located in South Carolina. In other words, North Carolina may advocate for a flow rate into South Carolina that does not protect

CRWSP's withdrawal rights or, correspondingly, the rights of UC and LCWSD. North Carolina may also attack the fairness or equity of South Carolina's permits for inter-basin transfers from the Catawba River, including CRWSP's permit.

Thus, through equitable apportionment, both North and South Carolina are likely to invade the rights and interests of CRWSP in the Catawba River.[1]

ARGUMENT

This Court has the power to grant government entities within a state leave to intervene in original actions. *See, e.g., Texas v. Louisiana*, 416 U.S. 965 (1974) (permitting city to intervene). Here, for the reasons given below, allowing CRWSP to participate would be "in the interest of a full exposition of the issues." *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981). Thus, "the just, orderly, and effective determination of [the] issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States v. Louisiana*, 354 U.S. 515, 516 (1957).

I. CRWSP HAS A DIRECT AND CONCRETE INTEREST IN THIS ORIGINAL ACTION.

CRWSP has "a direct stake" in any equitable apportionment of the Catawba River, *Maryland v. Louisiana*, 451 U.S. at 745 n.21, and any apportion-

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[1] North Carolina does not oppose CRWSP's intervention. South Carolina does oppose CRWSP's intervention. Unless North Carolina's answer strongly contravenes CRWSP's rights and interests in the Catawba River, CRWSP seeks to intervene as a party-defendant.

ment accomplished without its participation "may as a practical matter impair or impede [its] ability to protect that interest." FED. R. CIV. P. 24(a)(2).[2] This Court has regularly granted leave to intervene when an original action directly implicates the concrete interests of a non-party.

For example, in *Arizona v. California*, 460 U.S. 605 (1983), a number of Indian tribes moved to intervene in a dispute between several southwestern states regarding the apportionment of water from the Colorado River. This Court found that intervention was appropriate in part because the tribes had a direct interest in receiving a fair share of water rights from the river. *Id.* at 614-15. Similarly, in *Texas v. New Jersey*, 379 U.S. 674 (1965), which involved a dispute over which state had jurisdiction to escheat intangible personal property, the Court permitted Florida to intervene because it asserted a right to escheat a portion of the property in dispute. Tellingly, the Court denied Illinois leave to intervene because it "claim[ed] no interest in the property involved in this case." *Id.* at 677 n.6. Finally, in *Maryland v. Louisiana*, the Court permitted private pipeline companies to intervene in an original action by several states concerning Louisiana's imposition of a "first use" tax on natural gas. 451 U.S. at 745 n.21. The Court found intervention appropriate because the tax was

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[2] Although the Federal Rules of Civil Procedure do not directly govern intervention in this Court, they do serve as "a guide to procedures in an original action." *Arizona v. California*, 460 U.S. 605, 614 (1983); *see also* RULES OF THE SUPREME COURT OF THE UNITED STATES 17.2 (noting that the Federal Rules "may be taken as guides").

"directly imposed" on those companies, and they therefore had "a direct stake in this controversy." *Id.*

Here, too, any resolution of this original action will directly and concretely affect the interests of CRWSP. As a riparian user of the Catawba River, CRWSP has a right to the reasonable use of river water for beneficial purposes. *See White's Mill Colony Inc. v. Williams*, 609 S.E.2d 811, 817 (S.C. Ct. App. 2005) (citing *Lowe v. Ottaray Mills*, 77 S.E. 135, 136 (S.C. 1913)); *Biddix v. Henredon Furniture Industries, Inc.*, 331 S.E.2d 717, 720-21 (N.C. Ct. App. 1985). A reapportionment of the Catawba River between North Carolina and South Carolina will directly affect the amount of water that CRWSP can withdraw from its intake in South Carolina. As noted above, both UC and LCWSD have relied upon the water supply produced by CRWSP for the last 16 years to support their growing populations and economic base. Moreover, as the history of CRWSP shows, both UC and LCWSD turned to the Catawba River only after other water supply alternatives proved infeasible or insufficient. Thus, any change in the amount of Catawba River water that UC and LCWSD can withdraw through CRWSP could seriously and irredeemably affect their ability to support existing uses and sustain development.

Because CRWSP has a direct and concrete stake in this original action, intervention is warranted.

II. CRWSP IS NOT ADEQUATELY REPRESENTED BY EITHER STATE.

As noted above, CRWSP is located in South Carolina and is jointly owned by LCWSD, a resident

of South Carolina, and UC, a resident of North Carolina. However, neither State will adequately represent the interests of CRWSP or, correspondingly, of the two governmental bodies that participate in it. Instead, CRWSP has a "compelling interest in its own right, apart from its interest in a class with all other citizens and creatures of the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

Neither North Carolina nor South Carolina will provide adequate representation because CRWSP's use of water from the Catawba River is undeniably an interstate appropriation that cannot be individually or exclusively attributed to a single resident of either State. CRWSP is jointly owned and represents a regional, interstate hybrid of government entities from both States, governed by regulations from both States. Accordingly, neither State has the exclusive legal ability to treat it as one of its own citizens. This can be seen most easily in the regulations governing the final transfers of water from CRWSP to UC and LCWSD: LCWSD's receipt of this water is governed by South Carolina permits; by contrast, UC's receipt of this water is governed by South Carolina permits until the water reaches the North Carolina-South Carolina border, at which point North Carolina regulations apply.

Because of CRWSP's interstate nature, both States treat CRWSP as an independent and competitive third-party user of the Catawba River. This treatment has continued in this original action. For example, South Carolina specifically cites UC's appropriation of Catawba River water through CRWSP as an inequitable use (S.C. Compl. ¶ 21), even though LCWSD, which is located in South Carolina, is a joint

owner of CRWSP and will be directly affected by any decision restricting UC's right to use the Catawba River. Similarly, North Carolina has indicated an intent to seek a flow rate into South Carolina that will directly affect UC's water supply from CRWSP because the CRWSP plant's intake is located in South Carolina.

This Court has recognized that, when a State asserts an interest that is in conflict with an interest asserted by one of its citizens, the State cannot adequately represent that citizen's interests in an original action. *See Utah v. United States*, 394 U.S. 89, 92 (1969) (noting that private company's "right to intervene . . . had a substantial basis" when it asserted interests to real property against the competing claims of a State). Similarly here, both North Carolina and South Carolina have treated and are continuing to treat CRWSP as a competing and adverse user of the Catawba River. As a result, neither State will adequately represent the interests of CRWSP in this original action.

III. PARTICIPATION BY CRWSP WILL AID THIS COURT'S DECISION.

This Court's established case law requires the consideration of a number of factors to determine the proper equitable apportionment of an interstate river. *See Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) ("Apportionment calls for the exercise of an informed judgment on a consideration of many factors."); *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943) ("[I]n determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be

weighed as of the date when the controversy is mooted."). The participation of CRWSP would help this Court properly consider and balance those factors.

One of the most important factors that this Court considers is "the extent of established uses" – *i.e.*, the existing "consumptive use of water in the several sections of the river." *Nebraska v. Wyoming*, 325 U.S. at 618. As this Court has acknowledged, "the equities supporting the protection of existing economies will usually be compelling." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982) (*Colorado I*). With 36 million gallons of water produced per day, CRWSP has the second largest intake on the entire Catawba River, representing a significant existing and future use that must play a crucial role in this Court's decision. The participation of CRWSP will help this Court properly determine the extent and value of its existing use. CRWSP's participation is especially valuable here because, as described above, CRWSP's use of the Catawba River is highly unusual: it appropriates water for both downstream (LCWSD) and upstream (UC) consumption; it transfers water for use both inside and outside the Catawba River Basin (LCWSD serves the Lynches River Basin; UC serves the Yadkin-Pee Dee and Rocky River Basin); and it distributes water from the South Carolina side of the Catawba River to both South Carolina and North Carolina.

CRWSP's participation will also help this Court conduct the cost-benefit balancing that is at the heart of its equitable apportionment analysis. *See Colorado I*, 459 U.S. at 188 n.13 (considering "whether the benefit to Colorado from the diversion

will substantially outweigh the possible harm to New Mexico"); *Nebraska v. Wyoming*, 325 U.S. at 618 ("the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former"); *Kansas v. Colorado*, 206 U.S. 46, 113-14 (1907) (declining to adjust existing uses after "compar[ing] the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado"). This Court has emphasized that "hard facts, not suppositions or opinions, [must] be the basis for interstate diversions." *Colorado v. New Mexico*, 467 U.S. 310, 320 (1984) (*Colorado II*). Accordingly, this Court generally requires a detailed description of any proposed reapportionment as well as a concrete explanation of the benefits that would accrue. *See Colorado I*, 459 U.S. at 190; *see also Colorado II*, 467 U.S. at 309 (requiring "a State proposing a diversion [to] conceive and implement some type of long-range planning and analysis of the diversion it proposes"). In addition, this Court requires the parties to explain how "reasonable conservation measures," *Colorado I*, 459 U.S. at 190 – *i.e.*, those that are "financially and physically feasible," *Colorado II*, 467 U.S. at 319 (quoting *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922)) – could affect the cost-benefit analysis.

Given its substantial existing and potential future uses and its one-of-a-kind presence on both sides of the North Carolina-South Carolina border, CRWSP is uniquely able to contribute to the Court's cost-benefit analysis. This is especially true here because neither State possesses the concrete data that this Court requires to decide an original action on inter-

state river rights. Instead, that data is in the hands of existing riparian users such as CRWSP.

IV. INTERVENTION WILL NOT PREJUDICE THE PARTIES.

Finally, participation by CRWSP will not prejudice the parties. This original action is currently at an extremely preliminary stage, and fact-finding by the special master has yet to occur. Moreover, allowing CRWSP to participate will not open the door to a large number of other interested parties. CRWSP's interest in this original action is based upon its unique status as a joint venture comprised of units of government on both sides of the North Carolina-South Carolina line. As explained above, due to the hybrid nature of CRWSP, each State is at least potentially opposed in part to CRWSP's withdrawal and/or consumption from the Catawba River. These factors distinguish CRWSP from any other riparian user of the Catawba River that may seek to intervene in this original action. No other entity in either state straddles the North Carolina-South Carolina boundary as CRWSP does, nor does any other entity engage in a joint venture whose use of the Catawba River is opposed to some extent by both States. Thus, allowing CRWSP to participate poses no risk of unduly expanding the number of interested parties in this original action.

CONCLUSION

For the foregoing reasons, CRWSP respectfully asks this Court for leave to intervene in this original action.

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